ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA07-594

January 23, 2008

SHAYNE BENTON and
BROOKE A. BENTON
APPELLANTS

V.

RITA J. BENTON and The Estate of
WILLIAM TERRY BENTON
APPELLEE

AN APPEAL FROM UNION
COUNTY CIRCUIT COURT
[PR2006-250-2]

HON. MICHAEL R. LANDERS, JUDGE

AFFIRMED

This appeal lies from an order granting and denying requests for summary judgment. The trial court granted summary judgment in favor of appellees, the estate of William Benton (Mr. Benton), and Rita Benton, his widow and the administrator of his estate. It denied the summary-judgment request of appellants Shayne Benton and Brooke Benton, the decedent's children. The issue in this case is whether the trial court properly rewrote the decedent's will to award Mrs. Benton the entire estate. Because the will contained conflicting provisions that created patent ambiguities, we hold that the trial court did not err in rewriting the will so that Mrs. Benton receives the entirety of the estate. Accordingly, we affirm the trial court's order.[1]

[1]Appellants also argue that because Paragraph IV is unambiguous, the trial court erred in considering parol evidence in determining Mr. Benton's intent. However, the record does not support a conclusion that the trial court considered *any* parol evidence. The trial court referenced only the language of the will and did not even imply that it considered any exhibit other than Mr. Benton's will. In any event, because the will is patently ambiguous, the trial court could have considered parol evidence.

I. Facts

Mr. Benton and Mrs. Benton each executed wills on December 15, 2005. Mr. Benton died on April 8, 2006. He was survived by Mrs. Benton and appellants. He left a will naming Mrs. Benton as his administratrix, and she was subsequently appointed to serve in that capacity. In his will, Mr. Benton named as devisees Mrs. Benton, appellants, and Tony Hooks and Andy Hooks, Mrs. Benton's children by a former marriage. The main issue in this case is Mr. Benton's intended disposition of his estate with regard to Mrs. Benton, appellants, and the Hookses.

Mrs. Benton petitioned the trial court, probate division, to construe Mr. Benton's will, asserting that Paragraphs III and IV of the will contained conflicting language. These paragraphs of the will originally read as follows:

> III.
>
> I hereby give, devised [sic] and bequeath to my wife, Rita J. Benton, my entire estate, whether real, personal or mixed not herein otherwise bequeathed. If we die a simultaneous death, then I give, devise, and bequeath my entire state not herein otherwise bequeathed to Shayne Benton, Brooke Benton, Tony Hooks, and Andy Hooks to share equally, share and share alike.
>
> IV.
>
> Regardless of any other bequeaths herein, if I predecease my wife, Rita J. Benton, or if we die a simultaneous death, I hereby give, devise and bequest to [sic] my entire estate to my children, Shayne Benton, Brooke Benton, my step-children, Tony Hooks and Andy Hooks, to share equally, share and share alike.

(Errors in original.)[2]

Mrs. Benton attached to her petition the affidavit of George Van Hook, Jr., the attorney who drafted the will in 1995. Van Hook stated in his affidavit that pursuant to the wills he drafted for Mr. and Mrs. Benton, the surviving spouse was to receive all of the assets of the deceased spouse with the exception of the equity in the home owned by Mrs. Benton,

[2]The Hookses are not parties to the appeal. They each executed a "consent to construction of will" agreeing that Paragraph IV should apply only if Mrs. Benton predeceased Mr. Benton, and acknowledging that under that interpretation, Mrs. Benton would take all of Mr. Benton's estate.

which was to go to her two children. He further stated that Mr. Benton's will contained scrivener's errors and that it was not Mr. Benton's intent to leave all of his assets to his two children and step-children if Mrs. Benton survived him.

Appellants responded to the petition and, subsequently, the parties filed competing motions for summary judgment. Appellants denied that any conflict existed in the will; they asserted that Mr. Benton intended to leave his entire estate to Mrs. Benton if she survived him; and alleged that Mr. Benton's clear intent in Article IV was to leave Mrs. Benton only that property that was not otherwise bequeathed. They also asserted that Article IV controlled the will, as it is the last clause in the will. Appellants further argued that no parol evidence should be considered and requested the court to construe Mr. Benton's intent from the four corners of the will. Notably, neither party attached the lawyer's affidavit to their motion or referenced the affidavit in any manner; Mrs. Benton merely stated that the will was drafted by Van Hook.

No summary judgment hearing was held. In a letter opinion, the trial court granted Mrs. Benton's motion for summary judgment and denied appellants' motion for summary judgment. The trial court stated:

> Upon examination of the language contained in both Paragraphs II and IV, it is apparent that these paragraphs are in direct conflict and contain ambiguous language. ... .
>
> Paragraph III of the will clearly indicates the intention of the deceased was to give to his surviving wife of some fifteen years all of his estate. Further, it is clear from the language in that paragraph, that if the deceased and his spouse were to die simultaneously, the estate was to be shared equally as between the children of the deceased, claimants herein, and the two surviving children of Rita Benton.
>
> Paragraph IV obviously contains several scrivener's errors that result in a failure of that language to express the true intent of the testator. It is apparent that the testator desired that if his spouse survived him,[3] or in case of simultaneous death, claimants and the deceased's stepchildren were to share the estate equally. To interpret [the]

[3]It is apparent from the remainder of this paragraph, from the trial court's revision of paragraph IV, and from its subsequent formal opinion, that it meant to state, "if his spouse *predeceased* him".

> language as contained in Paragraph IV in any other way, would not make sense in taking into consideration the clear language as expressed in Paragraph III.
>
> Therefore, it would not be appropriate to disregard Paragraph III and to conclude that the language as contained in Paragraph IV should control, as it is the final paragraph containing a bequest or devise.
>
> ...
>
> After consideration of all of the language as it appears within the entire instrument and all of its provisions and various clauses, there can be no other reasonable interpretation or declaration of the testator's intention other than as stated in Paragraph III and Paragraph IV as revised in the following paragraph.
>
> Therefore, Paragraph IV is construed by this court as follows:
>
> > *Regardless of any other bequest herein, if I survive my wife, Rita J. Benton, or if we die a simultaneous death, I hereby devise and bequeath my entire estate to my children, Shayne Benton and Brooke Benton and my step-children, Tony Hooks and Andy Hooks, to share equally, share and share alike.*

(Emphasis in original.) The trial court trial court incorporated these findings in its subsequently issued formal opinion, and appellants appealed therefrom.

II. Standard of Review

Summary judgment is to be granted by a trial court only where there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *See Heinemann v. Hallum,* 365 Ark. 600, 232 S.W.3d 420 (2006). Once a moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id*. On appeal, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id*. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable men might reach different conclusions from

those undisputed facts. *Id*.

As a general matter, questions of intent are inappropriate for summary judgment, but, where, from the face of a written instrument, there is no doubt about the meaning of the instrument, summary judgment is appropriate. *See Chlanda v. Estate of Fuller*, 326 Ark. 551, 932 S.W.2d 760 (1996). We hold that the trial court properly granted summary judgment in favor of Mrs. Benton.

III. Construing the Will

The main issue in this case is whether the trial court erred in construing the will to devise all of Mr. Benton's estate to Mrs. Benton. Appellants argue that they should take everything under the will because Paragraph III bequeaths to Mrs. Benton only that property not otherwise bequeathed and because Paragraph IV, the last paragraph in the will, is controlling and unambiguously bequeaths the entirety of Mr. Benton's estate to them. We disagree.

When interpreting wills, the paramount principle is that the intent of the testator governs. *See Cleaves v. Parker*, 93 Ark. App. 150, 217 S.W.3d 136 (2005). The testator's intent is to be gathered from the four corners of the instrument itself. *Id*. However, extrinsic evidence may be received on the issue of the testator's intent if the terms of the will are ambiguous. *Id*. An ambiguity has been defined as an indistinctness or uncertainty of meaning of an expression in a written instrument. *Id*. The apparent meaning of particular words, phrases, or provisions in a will should be harmonized, if possible, to such scheme, plan, or dominant purpose that appears to have been the intention of the testator. *Id*.

Here, the disputed paragraphs of the will originally read as follows:

> III.
>
> I hereby give, devised [sic] and bequeath to my wife, Rita J. Benton, my entire estate, whether real, personal or mixed not *herein otherwise bequeathed*. If we die a simultaneous death, then I give, devise, and bequeath my entire state *not herein otherwise bequeathed* to Shayne Benton, Brooke Benton, Tony Hooks, and Andy Hooks to share equally, share and share alike.

IV.

Regardless of any other bequeaths herein, if I predecease my wife, Rita J. Benton, or if we die a simultaneous death, I hereby give, devise and bequest to [sic] my entire estate to my children, Shayne Benton, Brooke Benton, my step-children, Tony Hooks and Andy Hooks, to share equally, share and share alike.

(Errors in original.) (Emphasis added.)

Appellants would have us focus only on the terms of Paragraph IV, without considering the language in Paragraph III. However, where possible, a will must be construed to give force and meaning to every clause and provision. *See Cleaves, supra; Matter of Estate of Lindsey*, 309 Ark. 596, 832 S.W.2d 808 (1992). When construed together, Paragraphs III and IV, on their face, contain conflicting provisions that create patent ambiguities.

First, Paragraph III appears to bequeath to Mrs. Benton all of Mr. Benton's estate, not otherwise bequeathed, unless he and she die simultaneously, in which case the estate that is not otherwise bequeathed is shared by appellees and the Hookses. Article IV, by contrast, seems to unequivocally leave Mr. Benton's entire estate to appellees and the Hookses. Thus, the will first purports both to leave and to *not* leave Mr. Benton's estate to Mrs. Benton.

Second, the will both conditionally and unconditionally leaves the estate to appellants and the Hookses. Paragraph III expresses an intent to bequeath to appellants only that part of his estate "not herein otherwise bequeathed" and only in the event that he and Mrs. Benton die simultaneously. By contrast, Paragraph IV purports to *unequivocally* leave Mr. Benton's *entire estate* to his children and step-children if Mrs. Benton survives him or if she and Mr. Benton die simultaneously.

Third, Paragraph IV contains the phrase, "Regardless of any other bequeaths herein," which seems to imply that Paragraph IV supercedes Paragraph III. However, the similar phrase "not herein otherwise bequeathed" *also* precedes the separate bequests in Paragraph III, which indicates an intent to make a bequest in addition to or different from any bequests

made in Paragraph IV.

It is difficult to imagine clearer examples of repugnant provisions in a will. Hence, despite appellants' argument, these paragraphs do not evince an unambiguous intent to leave the estate to appellants and the Hookses *under all circumstances*. Rather, the conflicting devises created ambiguities that the trial court properly resolved so as to give effect to the testator's intentions.

The court reasoned that Paragraph III clearly indicated that Mr. Benton intended to give Mrs. Benton his estate if she survived him (which appellants do not dispute) and further reasoned that Paragraph IV contained scrivener's errors that "result in a failure of that language to express the true intent of the testator." Accordingly, trial court substituted the phrase, "if I *predecease* my wife" with the phrase, "if I *survive* my wife" so that Paragraph IV now reads:

> Regardless of any other bequest herein, *if I survive my wife*, Rita J. Benton, or if we die a simultaneous death, I hereby devise and bequeath my entire estate to my children, Shayne Benton and Brooke Benton and my step-children, Tony Hooks and Andy Hooks, to share equally, share and share alike.

(Emphasis added.)

As changed, Paragraph IV specifies the manner in which Mr. Benton's property will be disposed if Mrs. Benton predeceased him. This makes sense on the face of the will because Paragraph III disposed of Mr. Benton's property only in the event that he died first or he and Mrs. Benton died simultaneously. Where possible, a will must be construed to give force and meaning to every clause and provision. *See Lindsey*, *supra*. To interpret Paragraph IV as appellants urge would render Paragraph III meaningless.

Finally, we reject appellants' assertion that Paragraph IV governs because it is the last paragraph. Rather, the latter of conflicting provisions governs only when the conflicting provisions cannot be reconciled. *See id*; *Little v. McGuire*, 113 Ark. 497, 168 S.W. 1084 (1914). Because the trial court here was able to reconcile the two provisions, Paragraph IV,

as originally written, did not control over Paragraph III.

Affirmed.

HART and GLADWIN, JJ., agree.